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REPORT
101-79

THE AGE DISCRIMINATION IN EMPLOYMENT WAIVER PROTECTION ACT OF 1989

JULY 18 (legislative day, JANUARY 3), 1989.—Ordered to be printed

Mr. KENNEDY, from the Committee on Labor and Human Resources, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 54]

The Committee on Labor and Human Resources, to which was referred the bill (S. 54) to amend the Age Discrimination in Employment Act of 1967 with respect to the waiver of rights under such Act without supervision, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

29-010

S543-6

SECTION 1. SHORT TITLE.

This Act may be cited as the "Age Discrimination in Employment Waiver Protection Act of 1989".

SEC. 2. WAIVER PROVISION.

Section 7 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626) is amended by adding at the end thereof the following new subsection:

"(f)(1) An individual may not waive any right under this Act without the supervision of the Equal Employment Opportunity Commission or a court, except in settlement of a bona fide claim alleging age discrimination of a kind prohibited under section 4 or section 15 of this Act.

"(2) A settlement of a bona fide claim pursuant to paragraph (1) may occur only if the waiver is knowing and voluntary and only if—

"(A) a settlement agreement applicable to the bona fide claim is in writing and specifically refers to rights or claims arising under this Act;

"(B) the agreement does not waive rights or claims that may arise after the date of the agreements is entered into;

"(C) the rights or claims are waived in exchange for consideration in addition to anything of value—

"(i) to which the individual already is entitled; or

"(ii) that has been offered to a group or class of individuals under an early retirement incentive or other employment termination program;

"(D) the individual is given a reasonable period of time in which to consider the agreement; and

"(E) the individual is advised in writing to consult with an attorney prior to entering into the agreement.

"(3) No waiver agreement may affect the rights and responsibilities of the Equal Employment Opportunity Commission to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

"(4) For the purpose of this subsection, the term 'bona fide claim' means—

"(A) a charge of age discrimination filed with the Equal Employment Opportunity Commission;

"(B) an action alleging age discrmination filed in court by the individual or the individual's representative; or

"(C) a specific allegation of age discrimination communicated in good faith and in writing by the individual or the individual's representative directly to the employer (including, where applicable, a Federal agency), employment agency, or labor organization or their representatives.".

SEC. 3. EFFECTIVE DATE.

(a) IN GENERAL.—The amendments made by this Act shall take effect on the date of enactment of this Act.

(b) RULE ON WAIVERS.—Effective on the date of enactment of this Act, the rule on waivers issued by the Equal Employment Opportunity Commission and contained in section 1627.16(c) of title 29 of the Code of Federal Regulations shall have no force and effect.

I. SUMMARY

S. 54, the Age Discrimination in Employment Waiver Protection Act of 1989, amends the Age Discrimination in Employment Act of 1967 (ADEA) to ensure that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA.

The Waiver Protection Act establishes a mechanism by which older workers lawfully may waive their rights under the ADEA in the absence of supervision by the Equal Employment Opportunity Commission (EEOC) or a court. The bill authorizes unsupervised waivers *only* if an individual has made a specific bona fide claim of age discrimination against an employer, either by filing a charge with the EEOC, initiating a court action, or making a written allegation directly to the employer.

Once such a bona fide claim exists, the individual may settle the claim and waive ADEA rights without federal supervision as part of the settlement, *provided* that certain basic protections are present when the waiver is executed. These protections include (1) the waiver is knowing and voluntary; (2) the waiver is part of a written agreement that makes specific reference to rights and claims under the ADEA; (3) the waiver does not apply to rights or claims that may arise after the date of the agreement itself; (4) the waiver is exchanged for valuable consideration in addition to what the individual already is entitled to receive; (5) the individual is given a reasonable time period in which to review and consider the settlement agreement; and (6) the individual is advised in writing to consult with an attorney before executing a waiver.

Although the bill permits unsupervised waivers in these limited circumstances, it prohibits the use of unsupervised waivers when no bona fide claim is present. This means employers may *not* use waivers as a condition of participation in early retirement or other exit incentive programs offered to a group or class of employees, unless the waiver is supervised by the EEOC or by a court.

Finally, the bill nullifies a 1987 EEOC rule that had permitted and effectively encouraged the use of unsupervised waivers in a wide range of circumstances. Congress has twice suspended the EEOC rule since 1987; this legislation makes the suspension permanent.

II. Background and Need for Legislation

A. ADEA Enforcement and the Fair Labor Standards Act

The Age Discrimination in Employment Act (ADEA) broadly prohibits discrimination in the workplace based on age. Since its enactment in 1967, the ADEA has protected millions of older workers against arbitrary age discrimination and has increased the range of choices available for older Americans who are employed.

In the course of enacting the ADEA, Congress considered several different options for how the Act should be enforced. One proposal would have modeled enforcement after the National Labor Relations Act. This would have given the Secretary of Labor power to issue cease-and-desist orders enforceable in the courts of appeals, but would not have authorized a private right of action for aggrieved individuals. Another proposal would have adopted the statutory pattern of Title VII of the Civil Rights Act of 1964 (Title VII). This would have granted enforcement authority to the Equal Employment Opportunity Commission (EEOC) while allowing aggrieved individuals to file charges with the EEOC and subsequently to pursue a private right to action for equitable relief. A third proposal would have patterned ADEA enforcement after the Fair Labor Standards Act (FLSA). The FLSA approach authorizes the Secretary of Labor and aggrieved employees to bring an action for legal relief.

Although Congress in the end did not entirely adopt any one option, it chose to model ADEA enforcement substantially after the Fair Labor Standards Act, 29 U.S.C. 201 et. seq. Under section 7(b) of the ADEA (29 U.S.C. 626(b)), *"[a]mounts owing * * * as a result of a violation of [the ADEA] shall be deemed to be unpaid mini-*

mum wages or unpaid overtime compensation [under the FLSA]" (emphasis added). Section 7(b) further specifies that the rights created by the ADEA are to be "enforced in accordance with the powers, remedies, and procedures" of particular sections of the FLSA. This enforcement scheme provides for the Secretary of Labor to sue on behalf of an aggrieved individual. It also authorizes private civil actions for legal or equitable relief. In enacting the ADEA, Congress did model its definition of unlawful discriminatory action on the language of Title VII of the 1964 Civil Rights Act. But while the ADEA borrowed these *substantive* prohibitions from Title VII, Congress modeled its enforcement *procedures* after the FLSA.

The issue of ADEA enforcement procedures became controversial in the late 1970's with respect to the right to a jury trial. Some lower courts, applying what they viewed as a prohibition against jury trials under Title VII, had held that plaintiffs had no right to a jury trial under the ADEA. *E.g. Morelock* v. *NCR Corp.*, 546 F.2d 682 (6th Cir. 1976), *vacated* 435 U.S. 911 (1978). But the Supreme Court in 1978 recognized the importance of Congress' decision to model ADEA enforcement procedures on the FLSA and not Title VII. The Court held unanimously that because the FLSA provided for *legal* relief and consequently permitted jury trials, and because the ADEA incorporated the provisions for legal relief from the FLSA, aggrieved employees were entitled to a jury trial under the ADEA. *Lorillard* v. *Pons*, 434 U.S. 575 (1978).

The language of the Supreme Court's *Lorillard* decision is both unequivocal and highly instructive. As the Court stated,

> Th[e] selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA. Senator Javits, one of the floor managers of the bill, so indicated in describing the enforcement section which became part of the Act: "The enforcement techniques provided by [the ADEA] are directly analogous to those available under the Fair Labor Standards Act; in fact [the ADEA] incorporates by reference, to the greatest extent possible, the provisions of the [FLSA]." 113 Cong. Rec. 31254 (1967).

434 U.S. at 582. These FLSA provisions, of course, include section 16(c) (29 U.S.C. 216(c)), which requires federal supervision of the waiver of any rights.

B. WAIVER OF RIGHTS UNDER THE FAIR LABOR STANDARDS ACT

The FLSA was enacted to protect workers from substandard wages and oppressive working conditions. Congress recognized the significant inequalities in bargaining power that exist between employers and employees, and accordingly made the FLSA's provisions mandatory. Thus, it has long been settled that FLSA rights may not be abridged by private contract or otherwise waived by private agreement without undermining the legislative policies of the Act. More than 40 years ago, the Supreme Court held that an employee may not waive the right to minimum or overtime wages,

or the right to liquidated damages. *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 706–707 (1945). The decision that FLSA rights are not subject to private waiver has been reaffirmed consistently by the Supreme Court. *See Barrentine* v. *Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 739–740 (1981).

Indeed, the non-waivable nature of these statutory protections had led the Supreme Court to require that employees be covered *even when they knowingly and voluntarily seek to decline the protection of the FLSA. See Tony and Susan Alamo Foundation* v. *Secretary of Labor,* 471 U.S. 290, 302 (1985). The Supreme Court in that instance confronted the unusual circumstance of individuals, working for commercial businesses operated by a religious organization, who viewed themselves as volunteers for the ministry. The Court unanimously, and quite properly, declined to modify the mandatory protections of the FLSA. Emphasizing the "superior bargaining power" of employers, the Court reasoned that "employers might be able to * * * coerce employees to make such [voluntary] assertions, *or to waive their protections under the Act.*" Because such a "voluntary" exception inevitably "would affect many more people than those workers directly at issue" in a particular case, the Supreme Court refused to create such an exception. 471 U.S. at 302 (emphasis added).

The rule that FLSA rights may not be privately waived is subject to two qualifications. Each is consistent with the overall Congressional purpose of protecting employees who have inherently inferior bargaining power.

Section 16(c) of the FLSA authorizes the Secretary of Labor to "supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees," and specifies that "the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee" of any FLSA right of action. An employee who accepts such a payment supervised by the Secretary thereby waives his right to sue for the unpaid wages and for liquidated damages, provided the employer pays in full the back wages owed. Alternatively, under section 16(b) of the FLSA, once a private action for back wages has been brought, the plaintiff employees may present to the district court a proposed settlement. The court may then enter a stipulated judgement after scrutinizing the settlement for fairness.

The Secretary of Labor for decades has maintained that FLSA claims may be compromised only in these two days. That position has been affirmed consistently by the Supreme Court and lower courts. *See Brooklyn Savings Banks* v. *O'Neil,* 324 U.S. 697 (1945); *Schulte Co.* v. *Gangi,* 328 U.S. 108 (1946); *Barrentine* v. *Arkansas-Best Freight System, Inc.,* 450 U.S. 728 (1981); *Lynn's Food Stores, Inc.* v. *United States,* 679 F.2d 1350 (11th Cir. 1982). The Subcommittee on Labor examined the Secretary's position on this issue at its hearing last year on ADEA waivers. In a letter to the Subcommittee Chairman, the Solicitor of Labor and Assistant Secretary for Employment Standards Administration made clear that the Secretary of Labor today does not recognize as valid any waiver of FLSA rights that is not supervised either by the Secretary pursuant to section 16(c), or—in the case of a private action filed under section

16(b)—by a federal court. *See Age Discrimination in Employment Act—Waiver of Rights,* S. Hrg. 100–717, pp. 110–115 (100th Cong. 2d Sess.) (1988).

During the same 1988 hearing, the Subcommittee on Labor heard testimony from Carin Ann Clauss. An Associate Solicitor at the Department of Labor from 1968–76 and Solicitor of Labor from 1977–81, Ms. Clauss was directly involved in the administration and enforcement of the ADEA. Ms. Clauss made clear that throughout her tenure, the Secretary did not permit individuals to waive their rights under the ADEA or FLSA unless the waiver was supervised by the Secretary pursuant to section 16(c) or by a federal court pursuant to section 16(b). *See* S. Hrg. 100–717, at pp. 141–154.

C. THE EEOC RULE PERMITTING UNSUPERVISED WAIVERS

In 1978, Congress transferred authority for administering and enforcing the ADEA from the Secretary of Labor to the EEOC. The transfer of authority did not alter the substantive or procedural provisions of the ADEA, but it did authorize the EEOC for the first time to promulgate rules interpreting the Act.

The EEOC in 1985 issued a proposed rule permitting waivers under the ADEA without EEOC supervision. After a period for public comment, the EEOC issued its final rule on August 27, 1987, 52 Fed. Reg. 32293. The EEOC concluded that requiring government supervision of waivers was at odds with the ADEA goal of ensuring expeditious resolution of disputes. Based on its concern that delay would prejudice the claims of older workers, the Commission determined that it would allow unsupervised waivers so long as such waivers were "knowing and voluntary." The EEOC acknowledged that the FLSA prohibited such unsupervised waivers, but chose instead to follow the model of Title VII, which allows for unsupervised waivers under a "knowing and voluntary" standard.

The EEOC rule provided that in addition to being knowing and voluntary, a valid ADEA waiver may not release prospective rights or claims, and may not be in exchange for consideration that includes employee benefits to which the individual already was entitled. The Commission also identified certain factors as relevant to determining whether a waiver was knowing and voluntary. These factors included whether the waiver agreement was written; whether it was in understandable language; whether it clearly waived ADEA rights or claims; whether a reasonable period of time was provided for employee deliberation; and whether the employee was encouraged to consult with an attorney. Although all of these factors were deemed relevant, only one was essential for a waiver to be knowing and voluntary: the agreement had to be in writing. Finally, the EEOC rule provided that no such private waivers would affect the Commission's rights and responsibilities to enforce the ADEA. The rule also specified that a waiver would not bar an employee from filing a charge with the EEOC or participating in a Commission investigation. Yet a valid waiver might prevent the individual who signed from obtaining any relief should the EEOC determine that the underlying employer conduct had violated the ADEA.

D. CONGRESSIONAL RESPONSE TO THE EEOC RULE

Following issuance of the EEOC final rule, Congress promptly expressed grave concern that the rule was without legal foundation and contrary to public policy. In October 1987, the Senate adopted an amendment to the fiscal year 1988 EEOC appropriations bill, suspending the rule for one year. 133 Cong. Rec. S.14383–84 (Oct. 15, 1987). The amendment, offered by Senators Melcher and Metzenbaum, was unanimously approved. In support of their amendment, the two Senators criticized the EEOC for abandoning the "supervised waiver" requirements of the FLSA. Senator Melcher, Chairman of the Special Committee on Aging, explained the underlying policy concern:

> This is important because of the inherently different bargaining power of employers and employees. There will always be employees who feel that if they do not sign a waiver they will not only be out of a job, but also will forfeit any present or future benefits to which they may otherwise be entitled. On top of this, surveys have shown that most older workers don't know their rights under the ADEA. Nobody can knowingly waive his or her rights if he or she is unaware of what they involve.

133 Cong. Rec. S.14383 (Oct. 15, 1987). The House of Representatives agreed to accept the amendment, and implementation of the EEOC rule was precluded. *See* 133 Cong. Rec. H. 12401, 12534 (Dec. 21, 1987).

In the spring of 1988, both the House and Senate held hearings on the issue of waiver of rights under the ADEA. *See* S. Hrg. 100–717, *supra; Oversight Hearing on Waivers Under the Age Discrimination in Employment Act*, H. Hrg. 100–68 (100th Cong., 2d Sess.) (1988). Following these hearings, the Senate Appropriations Committee acted in June 1988 to extend the suspension of the EEOC rule for another year as part of the EEOC's fiscal year 1989 appropriations bill. This time, the action was initiated by Senators Hollings and Rudman, the chairman and ranking minority member of the appropriations subcommittee responsible for the EEOC.

The continued suspension of the EEOC rule drew strong bipartisan support in the Senate. Prior to the subcommittee markup, Chairman Hollings received a letter from Senators Sasser, Leahy, Grassley, Mikulski, DeConcini, Weicker, Reid, Chiles and Lautenberg. The letter was highly critical of the EEOC position:

> We have followed with great interest the recent hearings in both the Senate and the House on this issue. These hearings have highlighted both the substantial opposition to the rule and the doubtful validity of the EEOC interpretation of Congress' intent when it incorporated the FLSA enforcement procedures into the ADEA. We also believe serious questions have been raised about the degree to which the EEOC rule adversely affects the important rights of older workers to be free from age-based employment discrimination. Indeed, the rule will primarily benefit employers by making it easier for them to offer voluntary and involuntary enhanced severance programs in an

> illegal and discriminatory manner by shielding them from liability under the ADEA.

Letter of June 7, 1988, reprinted at 134 Cong. Rec. S.14511 (Oct. 4, 1988).

In another letter supporting the continued suspension, Senators Metzenbaum, Quayle and Melcher noted their concerns:

> Serious questions have been raised regarding both the legal and policy implications of the [EEOC] rule. In particular, there is tension between recent lower court decisions permitting unsupervised waivers under the ADEA and established Supreme Court precedent incorporating into the ADEA the enforcement procedures of the Fair Labor Standards Act. The FLSA precludes unsupervised waivers, and the Department of Labor consistently has refused to recognize as valid waivers that are not supervised by the Secretary or a court. In addition, senior citizen groups and others have expressed concern that the EEOC rule would permit unsupervised waivers for employees who have not filed a charge, who are not involved in any dispute with their employer, and who have no reason to be on guard to protect their rights.

Letter of June 13, 1988, reprinted at 134 Cong. Rec. S. 14511 (Oct. 4, 1988). The Senate passed the continued suspension without dissent (134 Cong. Rec. S. 10022 (July 27, 1988)), and the House again agreed to the provision in conference (134 Cong. Rec. H. 8399 (Sept. 27, 1988)).

Although Congress has acted decisively to prohibit the EEOC rule from taking effect, a number of lower federal courts have issued decisions permitting unsupervised waivers under the ADEA in certain circumstances. Some of these courts relied, at least in part, on the EEOC rulemaking proceeding before the rule was suspended. *See., e.g., Runyan* v. *National Cash Register Corp.,* 787 F.2d 1039, 1045 (6th Cir. 1986) (en banc), *cert. denied,* 479 U.S. 850 (1986); *EEOC* v. *Cosmair, Inc.,* 821 F.2d 1085, 1091 (5th Cir. 1987); *Dorosiewicz* v. *Kayser-Roth Hosiery, Inc.,* unpublished decision (4th Cir. 1987). One court noted the Congressional action suspending the EEOC rule but declined to preclude completely private waivers of rights guaranteed under the ADEA. *See Coventry* v. *United States Steel Corp.,* 856 F.2d 514, 521–522 n.8 (3d Cir. 1988). But, unlike the EEOC in its rulemaking, these lower court decisions generally allow unsupervised waivers only in settlement of a factual dispute between the parties or to compromise a claim that has already been brought *See Runyan, supra,* 787 F.2d at 1044: *EEOC* v. *United States Steel Corp.,* 583 F. Supp. 1357, 1362 (W.D. Pa. 1984). Moreover, even assuming that unsupervised waivers were enforceable under the ADEA, lower courts have expressed concern over potential abuse of the waiver process. *See EEOC* v. *United States Steel Corp., supra* (prohibiting employer from requiring employees to sign a waiver in order to obtain a specified retirement pension); *Cassino* v. *Reichhold Chemicals, Inc.,* 817 F.2d 1338, 1348 (9th Cir. 1987) *cert. denied* 108 S.Ct. 785 (1988) (holding that termination

agreement requiring employee waiver in return for severance pay was evidence that employer willfully violated ADEA).

E. UNFAIR AND ABUSIVE WAIVER PRACTICES

Both the EEOC and some lower courts in recent years have permitted older workers to waive their rights under the ADEA without appropriate protections or supervision. The Committee's major concern in this regard is that early retirees or employees being offered the chance to participate in exit incentive or other group termination programs can effectively be forced to waive their right to file a claim when the employer conditions such participation on the signing of a waiver. The problem is particularly acute in large-scale terminations and layoffs, where an individual employee would not reasonably be expected to know or suspect that age may have played a role in the employer's decision, or that the program may be designed to remove older workers from the labor force. The pre-emptive waiver of rights occurs before a dispute has arisen and indeed before an employee is even aware of any potential or actual pattern of discrimination. Such a pre-emptive waiver also may preclude the employee from asserting claims that arise out of subsequent discriminatory conduct by the employer, *e.g.,* hiring younger workers to replace the terminated older workers. These waivers are both unfair and inconsistent with the intent of the ADEA.

It is not accidental that Congress incorporated into the ADEA many of the protective procedures of the FLSA. Age discrimination victims typically earn more than the minimum wage, but their average annual income is only $15,000. Moreover, once out of work, these older Americans have less than a 50/50 chance of ever finding new employment. The often have little or no savings, and may not yet be eligible for Social Security. *See* S. Hrg. 100–717, at p. 149 (Testimony of Carin Ann Clauss). *See also* U.S. Bureau of the Census, *Money Income of Households, Families and Persons in the United States: 1987,* (Consumer Income, Series P–60, No. 162, at Table 36); Flaim and Sehgal, "Displaced Workers of 1979–1983: How Well Have They Fared?" *Monthly Labor Review* (U.S. Dept. of Labor, June 1985, at p. 10). Accordingly, it is reasonable to assume that many employees would be coerced by circumstances into accepting significant compromises. This is especially true where employees are unable even to recognize the potential of their claims because no dispute exists between them and their employer.

1. Manipulation of older workers

The Subcommittee on Labor hearing record is replete with evidence of older workers who have been manipulated or coerced into waiving their rights under the ADEA. Some witnesses testified to a subtle form of manipulation. Robert Patterson was a tool designer and draftsman at Xerox who in 1982 was offered the "opportunity" to participate in a "voluntary" reduction-in-force if he would agree to waive all claims against his employer. At the time, Patterson was 55 years old, and had been with Xerox for 15 years. Although the RIF was labeled "voluntary," Patterson and a 61 year old colleague were advised privately that if they did not volunteer there was "a 99 percent sure chance" that they would be laid off involun-

tarily in the next round of reductions. Patterson did not want to leave his job. But the "voluntary" reduction offered him 3 months additional severance over what he would get if laid off involuntarily. He felt he had no choice: he made the "request" and signed the waiver. After he left, Patterson learned that his department subsequently had hired 3 new contract draftsmen, aged 21, 33, and 35. *See Age Discrimination in Employment Waiver Protection Act of 1989,* S. Hrg. 101-24, pp. 59-65 (101st Cong., 1st Sess.) (1989).

William Terrell, a stockroom foreman at Xerox, described an experience virtually identical to Patterson's. In 1982, he was 56 and had spent 12 years with Xerox. He too was advised that if he did not leave voluntarily, he would be laid off with less generous benefits. As Terrell explained, "[n]eeding these additional benefits and realizing that it might be easier to locate a job before others were fired, I reluctantly "accepted" the voluntary RIF [and signed the waiver]." S. Hrg. 100-717, at pp. 52-53.

Patterson, Terrell, and some 1,300 other present and former Xerox workers later sued the company alleging age discrimination. The plaintiffs in that action contend that their employer's massive reduction-in-force was unlawfully discriminatory under the ADEA. They allege that over a period of years, Xerox used "voluntary" and involuntary reductions as a means of replacing older workers with less expensive younger hires. Such a pattern or practice could not possibly have been known to these plaintiffs when they were leaving their jobs. Yet after nearly 6 years of litigation, a federal court is still reviewing whether the *waivers* executed by Patterson, Terrell, and hundreds of others would bar claims under the ADEA. It is unclear whether the court will ever consider their challenge to the underlying reduction program. In the meantime, Terrell's family struggled financially while Terrell was unemployed, suffered a heart attack and is now dependent upon disability pay. Patterson described his own ordeal in the following terms:

> Since November 30, 1982, I have either been *unemployed* or *underemployed.* I applied to nearly *200* firms (many of them repeatedly) in the past six years. In order to live, I have been forced to take, when I could find them, unskilled, menial jobs at near minimum wage. I have been a cook, a bank courier, a laborer, a substitute industrial arts teacher, and an overnight aide in a cerebral palsy residence * * * I have worked since I was *eleven years old* and I had to go on unemployment insurance for the *first time in my life!* Finally, last July [1988] I was hired * * * as a tool designer. Until then, I found that no one seems to want to hire anyone over the age of 50.

S. Hrg. 101-24, at p. 63.

2. Lack of information or expertise

Other older workers who testified before the Subcommittee on Labor described signing waivers without knowing or understanding the facts of any claim they might have. The demographics of cost-cutting are seldom shared by employers with their workforce.

Gerald Clay was an engineer with Caterpillar Tractor Co. After 17 years of successful employment, Clay—in his late 40's—was told

in 1985 that he was being terminated as part of a general reduction-in-force. He spoke with his superiors, and was assured that the reduction was economically motivated, that it affected many others in his unit, and that it was no reflection on his own performance. Satisfied with this explanation, Clay signed a general release waiving all claims against Caterpillar, which he was advised he had to do in order to receive the package of separation benefits. Only weeks later, when he came back to visit his former employer, did Clay discover that many younger employees in his unit had not been terminated. By then, Clay had signed the waiver, and he is now trying to get his job back through the courts. There was a preliminary ruling against him, based on the waiver. He is appealing from that decision, a process that may take years. *See* S. Hrg. 101–24, at pp. 67–76.

Donald Graham was a 55-year-old mid-level manager with Pet Inc., a St. Louis-based company. In 1987, Pet announced that it was terminating some 100 employees as part of a "restructuring and downsizing" effort. Graham and the others were offered an enhanced severance payment if they would sign a "general release" waiving their right to bring a claim for age discrimination. Graham consulted an attorney, who told him that he could refuse to sign the waiver and he might have a valid claim for age discrimination. But the attorney advised him that regardless of the merits of his claim, he really could not afford *not* to take the severance payment. At age 55, with the prospect of a long job search ahead of him, he needed the income. Graham, who signed the waiver and never brought a legal action, summed up his reaction to this "catch-22" situation:

> [W]hen you are presented with a buy-out of your civil rights, it gave me, at least, a feeling of outrage that this sort of thing was happening, and as I found out later, even encouraged and advocated by the EEOC. (S. Hrg. 100–717, at 46).

3. Coercion of older workers

Still others who testified before the Subcommittee on Labor described instances of extreme pressure to waive rights, pressure that was tantamount to coercion. Nelson Marans, age 63, had spent almost 30 years as a highly respected chemist at W.R. Grace. In July 1987, his employer gave him a choice: accept early retirement with the details to be discussed later or take a demotion. After a week in which Marans interviewed for the new position and participated in several hours of training, he was given a copy of an early retirement agreement on a Friday afternoon. The agreement included a general release waiving his right to assert all present and future claims against W.R. Grace. On the following Monday, Marans was asked to accept the retirement "offer"; when he refused, he was fired. He has received no help from the EEOC, although he sought their assistance for months. *See* S. Hrg. 100–717, at pp. 12–42, 64.

Kenneth Lancaster was a 53-year-old service manager for a car dealership in St. Paul, Minnesota. As of December 1983, he had served in that capacity for over 12 years with numerous favorable

reviews, and had received a $3,000 merit increase earlier in the year. On Friday afternoon December 31, Lancaster was told without warning that he was being terminated effective that day, and was offered severance pay if he agreed to waive all claims against the company. He asked to take the termination agreement home over the New Year's weekend, but was told no. He asked for time to take the documents to an attorney, but was told he did not need to because "the dealership's lawyers had already gone over everything." Later that same afternoon, his supervisor told him that the severance amount was being raised, and that the papers would be redrafted over the weekend. The supervisor brought the revised agreement to Lancaster's home on Tuesday, January 4 (the first workday of the new year). Lancaster was told that if he did not sign immediately he would get no severance at all. He signed the waiver agreement. Two months later, Lancaster learned that his replacement was a 28-year old with little managerial experience. He filed an age discrimination charge. Ultimately, a federal court dismissed his case on the grounds that he had signed a valid waiver. See S. Hrg. 101-24, at pp. 54-59.

This evidence, although anecdotal, paints a disturbing picture of waiver practices. Moreover, for every older worker who is willing to tell his story to a court or a Congressional committee, there are thousands of others who simply sign away their rights. These workers are given no reason to suspect age discrimination and often are not even aware of their rights under the ADEA. For them, waiving all claims through a general release effectively chills any meaningful inquiry into whether they are the victims of unlawful age discrimination.

F. CONCERNS RAISED ABOUT WAIVER PROTECTION LEGISLATION

This legislation has received widespread expressions of support from organizations concerned about abusive waiver practices and about the questionable legal foundation for the EEOC rule. The bill has been endorsed by the American Association of Retired Persons, the Older Women's League, the National Council on Aging, the National Council of Senior Citizens, the Villers Foundation, the Gray Panthers, and the Leadership Council of Aging Organizations, representing over 15 national senior citizen associations and groups.

Notwithstanding this support, several questions have been raised concerning the legislation.

1. The title VII analogy

Some observers contend that requiring supervision and other protections for older workers who are asked to waive their rights is excessively paternalistic, and that older workers should be treated no differently from the female and minority workers who are protected against discrimination under Title VII of the 1964 Civil Rights Act. But as discussed above, Congress decided in 1967 that where procedural protections are involved, the ADEA *should* treat older workers differently from workers protected under Title VII.

In a number of instances, the ADEA provides plaintiffs with greater protections than does Title VII. ADEA plaintiffs have the right to jury trials and liquidated damages, while Title VII plain-

tiffs do not. ADEA plaintiffs may bring lawsuits 60 days after filing a charge with the EEOC, whereas Title VII plaintiffs must wait 180 days for the EEOC to act. And, unlike Title VII, where the availability of back pay is a matter of equitable discretion, the ADEA incorporates the FLSA provision that employers "*shall be liable*" for such backpay amounts. Inasmuch as liability for backpay is *mandatory* under the ADEA, any effort to compromise that liability warrants special federal attention. Finally, and of critical importance, the ADEA adopts specific language governing waivers from section 16(c) of the FLSA, whereas Title VII is silent on the waiver issue.

Further, there are important practical distinctions between the way waivers are used under Title VII and ADEA. Typically under Title VII, employees (or applicants for employment) recognize and complain about unequal treatment. These employees initiate disputes which may than be resolved through a compromise settlement. Any waiver of rights is negotiated on an individual basis as part of the settlement. The settlement agreement is executed by individuals who are on notice that they are involved in an arm's-length adversarial relationship with their employer. In such a "dispute" context, the parties can negotiate a binding settlement which may include a knowing and voluntary waiver of rights.

By contrast, ADEA waivers often do *not* arise in the context of an individual dispute. Employers offer "voluntary" exit incentives to groups of employees as part of voluntary or involuntary termination *programs.* There is no dispute between indviduals and their employer. There also is no negotiation between individuals and their employer. The employer offers the incentive on a take-it-or-leave-it basis. Moreover, the incentive option is labelled "voluntary" and is financially attractive. In this context, older employees have little or no reason to suspect that their employer is a potential adversary. These older workers may be manipulated or even coerced into signing away their ADEA protections. That is precisely why the provisions of this legislation are so important.

2. Employer willingness to offer exit incentive programs without waivers

The Committee received some testimony warning that if Congress legislates to restrict or eliminate the use of waivers in exit incentive programs, many employers will stop offering these programs. *See* S. Hrg. 100-717, at pp. 175-176 (Testimony of Dennis Vaughn); S. Hrg. 101-24 at pp. 127 (Testimony of Cathie A. Shattuck), and 129-130 (Testimony of Mark S. Dichter). It is argued that employees generally are supportive of the incentive programs and would be unhappy to see them diminish or disappear. Without exit incentives, employers would rely heavily if not exclusively on individual discharges and mass layoffs, a situation that would leave employees worse off than they are now.

This argument ignores the fact that most employers today *do not use waivers as part of their exit incentive programs.* Last year, the staff of the Subcommittee on Labor conducted an informal survey based on published reports of more than a dozen major American companies that had implemented early retirement incentive or other worker reduction programs in recent years. Some 75 percent

of the companies contacted reported that they had *not* sought waivers for the programs in question. Since 1985, more than 13,000 workers were part of a voluntary reduction in force at IBM. In the same time period, 11,000 workers departed at DuPont; 16,500 at AT&T; 6,000 at Phillips Petroleum; 3,500 at Union Carbide; 1,600 at Hewlett-Packard; 650 at Polaroid; 600 at Mellon Bank and 600 at CBS. None of these companies asked their employees to waive their rights as a prerequisite to participating in the program. Indeed, one top corporate official stated that waivers could undermine the atmosphere of good will that is essential to such a program. He explained that the waiver request could discourage participation by arousing needless suspicion among employees. *See* S. Hrg. 100–717, at p. 2.

Although the Labor Subcommittee survey was informal, the U.S. General Accounting Office recently completed a systematic study reaching virtually the same conclusions. The GAO reviewed the waiver practices of more than 70 *Fortune 100* companies between 1979 and 1988. Based on its findings, the GAO estimates that 90 percent of the *Fortune 100* companies sponsored an exit incentive program at least once during the previous 10 years. But only 28 percent of those companies required their employees to sign a waiver as a condition for receiving enhanced benefits. Waivers were used more frequently in the last two years than in the early 1980's. But even in 1988, 65 percent of the employers who sponsored an exit incentive program *did not ask their employees to sign waivers. See Age Discrimination: Use of Waivers by Large Companies Offering Exit Incentives to Employees,* GAO/HRD–98–87 (April 1989).

The GAO study also lists some of the reasons given by employer representatives for using or not using waivers in connection with their exit incentive programs. Not surprisingly, the dominant reason given for using waivers was to protect the employer from lawsuits or claims by former employees. One employer representative added that the company was "saving younger people's jobs," an impermissible justification under the ADEA. GAO reports that the reasons given most often for *not* using waivers were (1) the program was voluntary; (2) waivers are bad for employee relations; and (3) no lawsuit was anticipated. Other noteworthy comments received from company officials not using waivers include: "[W]aivers wouldn't make any difference—employees could still sue the company"; "[t]he program was voluntary; not performance-based separation"; and "downsizing is a legitimate business operation * * * there is no need for waivers." *See GAO Report, supra,* p. 14.

The results of the Subcommittee's informal survey and the GAO study are supported by common sense. Downsizing is a frequent occurrence in response to global competition, merger activity, and other practices. Employers know that if hundreds or thousands of employees are simply laid off with no benefits or terminated for cause, the result may be bitterness and lawsuits. Accordingly, employers have come to rely heavily on early retirement and other exit incentive programs to reduce their workforce. Such programs, if properly conceived and administered, can be both humane and economically efficient. By treating employees with decency and respect, employers minimize the prospect of litigation from those who

leave, and of disillusionment from those who remain. Waivers are not essential to this approach. Exit incentive programs arose long before employers began using waivers, and most employers still do not use waivers when offering such programs. Restricting use of waivers should have little impact on an employer's ability or willingness to offer attractive benefits to employees as part of a group termination program.

The Committee finds a certain irony in the argument that if waivers are restricted for exit incentive programs, then employers may have to resort to individual discharges or other "less kindly" methods of termination that will erode the self-esteem of older workers. This notion that older employees are "better off" with waivers even if they do not know it derives ultimately from a vision of paternalistic employers and unproductive older workers. Congress rejected that vision when enacting the ADEA in 1967, and rejected it again emphatically when abolishing mandatory retirement in 1986 by a unanimous vote of both houses. Such justifications are no more creditable in the context of waivers.

3. EEOC capacity to supervise waivers

Some observers have argued that the EEOC lacks the resources and perhaps even the ability to provide effective supervision of ADEA waivers. In that regard, however, the Committee notes that this bill actually lessens the burden on the Commission for supervision of ADEA waivers. Prior to the EEOC's promulgation of its currently suspended rule, the enforcement provisions of the FLSA made clear that all valid waivers had to be supervised by the EEOC. As discussed below in section V, this bill does not require the EEOC to supervise knowing and voluntary waivers that settle "bona fide claims" of age discrimination, *e.g.* lawsuits or informal written statements alleging age discrimination. Thus, the bill creates for the first time a class of valid, unsupervised ADEA waivers.

The EEOC, of course, should supervise such waivers where supervision furthers the Commission's statutorily required efforts at conciliation, conference and persuasion. These efforts frequently result in settlements of charges or lawsuits that (1) are approved by the EEOC, (2) provide relief satisfactory to all parties, and (3) entail the withdrawal or closing of the ADEA charge or lawsuit.

With respect to group termination programs, where no dispute in the form of a bona fide claim exists, the burdens of supervision may well be overstated. As discussed above, the majority of employers offering such programs *do not seek ADEA waivers at all.* Moreover, where such waivers *are* sought, the Committee does not require or expect that the EEOC will supervise them in most instances. The bill provides simply that if the waiver signed in a nondispute context is to be binding on the parties, then it must be supervised. Many unsupervised waivers may go unchallenged because there is no allegation of age discrimination.

If an employer *asks* the EEOC to supervise a group termination program in order to get waivers from the participating employees, the EEOC has at least two options. First, the EEOC can follow the lead of the Secretary of Labor under the FLSA. The Secretary for 40 years has refused to supervise waivers unless they settle a charge or claim already filed with the Department of Labor. By re-

fusing to validate waivers obtained in non-advesarial circumstances, the Secretary sends a strong message to employers not to ask for waivers in such circumstances, and informs employers that their best protection against lawsuits is to obey the law.

Alternatively, if the EEOC decides that it *wants* to supervise certain waivers in a non-adversarial context, the Commission must first review the termination program in question. This review should include close examination of the process and factors used by the employer to determine benefits in the program and to identify, select or exclude participants in the program who are protected under the ADEA. Only after close and comprehensive program review can the EEOC advise employees as to the value of the rights they are being asked to waive. The Committee notes, however, that such a review still may not protect employees from subsequent conduct by the employer that would give rise to a claim of age discrimination, *e.g.,* hiring younger workers, after the completion of the program, to take the place of terminated older employees. Accordingly, the Committee does not require or expect the EEOC to agree, as a routine matter, to supervise waivers in group termination programs.

4. Lower court decisions

As noted above, a number of lower courts have ruled that unsupervised waivers of ADEA rights are legal. The Committee has been urged to find in these lower court decisions persuasive evidence that such waivers should be permitted.

For several reasons, however, the Committee concludes that reliance on these lower court decisions is misplaced. Courts upholding the validity of unsupervised waivers often have done so relying at least in part on the EEOC rulemaking proceeding. *See Runyan* v. *National Cash Register Corp.,* 787 F.2d 1039, 1045 (6th Cir. 1986) (en banc) *cert. denied* 479 U.S. 850 (1986); *EEOC* v. *Cosmair, Inc.,* 821 F.2d 1085, 1091 (5th Cir. 1987); *Dorosiewicz* v. *Kayser-Roth Hosiery, Inc.,* unpublished decision (4th Cir. 1987). But that proceeding has now been discredited by Congressional action suspending the rule.

In addition, the lower court decisions are confusing and even conflicting as to *when* unsupervised waivers should be allowed. *Compare Runyan* v. *National Cash Register Corp., supra,* (allowing unsupervised waivers *only* after negotiated settlement of a factual dispute between the parties) *with Bormann* v. *AT&T Communications,* 875 F.2d 399 (2d Cir. 1989) (allowing unsupervised waiver as part of involuntary separation program with no negotiation of terms of agreement). At least one court of appeals has raised doubts as to whether an employer may require waivers in the absence of a claim, holding that such a waiver request was evidence that the employer had willfully violated the ADEA. *See Cassino* v. *Reichhold Chemicals, Inc.,* 817 F.2d 1338, 1348 (9th Cir. 1987), *cert. denied* 108 S.Ct. 785 (1988).

The lower court decisions also cannot be reconciled in terms of *what protections must be accorded to employees* in an unsupervised context. *Compare Lancaster* v. *Buerkle Buick Honda Co.,* 809 F.2d 539 (8th Cir. 1987), *cert. denied* 107 S.Ct. 3212 (1987) (applying cursory "ordinary contract principles" approach to uphold unsupervised waiver even though ADEA was never mentioned by either

party and the employee was not encouraged to seek counsel) *with Cirillo* v. *Arco Chemical Co.,* 862 F.2d 448 (3rd Cir. 1988). (applying more thorough "totality of circumstances" approach to uphold unsupervised waiver, emphasizing that plaintiff discussed ADEA concerns with employer and was encouraged to consult with counsel before executing waiver). Even the decisions that have followed the more protective "totality of the circumstances" approach adopted in *Cirillo* have not held that certain protective factors *must* be present. Rather, the decisions scrutinize many different factors or criteria on a case-by-case basis, in effect promising more litigation in the future. The instant legislation, by contrast, will limit unsupervised waivers to certain situations and then spell out clear and ascertainable standards to govern those situations. This approach will clarify an unsettled area of the law and reverse a disturbing trend of litigation concerning ADEA waivers.

Finally, there is an obvious tension between lower court decisions permitting unsupervised ADEA waivers and an earlier Supreme Court holding. The Committee has explained in great detail the Supreme Court's unanimous 1978 decision that the ADEA borrowed various enforcement provisions (including supervision of waivers) from the Fair Labor Standards Act. *See Lorillard* v. *Pons,* 434 U.S. 575 (1978). Congress has expressed unequivocal approval for the decision reached in *Lorillard. See* Pub. L. 95-256, section 4; 92 Stat. 190, 191 (April 6, 1978) (providing explicitly for the right to trial by jury under ADEA). The Committee has concluded that lower court decisions inconsistent with the holding in *Lorillard* are simply wrong. This provides an additional justification for legislation to clarify a confused area of the law.

III. History of the Legislation

S. 54, a bill to amend the Age Discrimination in Employment Act of 1967 with respect to the waiver of rights under such Act without supervision, and for other purposes, was introduced on January 25, 1989 by Senators Metzenbaum, Heinz, and Pryor. The bill was referenced to the Committee on Labor and Human Resources. A hearing was held on S. 54 in the Subcommittee on Labor on March 16, 1989. The legislation was considered at an executive session of the full Committee on June 14, 1989. Senators Kennedy and Metzenbaum offered an amendment in the nature of a substitute which contained the text of the original bill as amended by an amendment which had been agreed upon by Committee members. The substitute amendment was accepted by the Committee on Labor and Human Resources on June 14, 1989.

IV. Hearings

Public hearings were conducted by the Subcommittee on Labor in Washington, D.C. on March 16, 1989, to review S. 54, the Age Discrimination in Employment Waiver Protection Act. The following individuals presented testimony:

Senator John Heinz, Pennsylvania;

Clarence Thomas, Chairman, U.S. Equal Employment Opportunity Commission, Washington, D.C.;

Joseph F. Delfico, Director, Income Security, United States General Accounting Office, Washington, D.C.;
Kenneth Lancaster, St. Paul, Minnesota;
Robert C. Patterson, Rochester, New York;
Gerald Clay, Peoria, Illinois;
George Galland, Davis, Barnhill and Galland, Chicago, Illinois;
Mary Gardiner Jones, Secretary, Board of Directors, Older Women's League, Washington, D.C.;
Mark S. Dichter, Morgan, Lewis, Bockius, Philadelphia, Pennsylvania;
Cathie A. Shattuck, Epstein, Becker and Green, Washington, D.C.

Public hearings also were conducted by the Subcommittee on Labor in Washington, D.C. on May 24, 1988, to review the use of waivers under the Age Discrimination in Employment Act of 1967. The following individuals presented testimony:
Senator John Melcher, Montana;
Nelson Marans, Silver Spring, Maryland;
Donald Graham, Chesterfield, Missouri;
William Terrell, Rochester, New York;
William Komer, Legal Counsel, Equal Employment Opprtunity Commission, Washington, D.C.;
Carin Clauss, associate professor, University of Wisconsin Law School, Madison, Wisconsin;
Judith Brown, American Association of Retired Persons, Washington, D.C.;
Dennis Vaughn, U.S. Chamber of Commerce and the California Employment Council, Washington, D.C.

V. Committee Views

This legislation provides that older workers may waive their rights under the ADEA in the absence of supervision only when settling a bona fide claim of age discrimination. The bill identifies specific protections that must be present in order for an unsupervised waiver to be valid when a bona fide claim is being settled. The legislation also provides that even a valid waiver may not interfere with an individual's right to participate in EEOC proceedings aimed at enforcement of the ADEA. Finally, the bill nullifies a 1987 EEOC rule that had sanctioned the use of unsupervised waivers without adequate protections for individual employees.

A. LIMITED USE OF UNSUPERVISED WAIVERS

Under the ADEA enforcement provisions borrowed from the FLSA, an individual may not waive rights without supervision. This bill provides for the first time that such unsupervised waivers may occur in limited circumstances. In order for an individual to waive any right under the ADEA without the supervision of the EEOC or a court, the waiver must be part of the settlement of a "bona fide claim" alleging age discrimination of a kind prohibited under sections 4 or 15 of the ADEA. 29 U.S.C. 623, 633a.

The key to this approach is the definition of "bona fide claim." The bill provides that a bona fide claim may take one of three forms. First, it may constitute a charge of age discrimination filed

with the EEOC. The Committee intends that this provision would be satisfied by the filing of a claim of age discrimination with a state or local fair employment agency having a work-sharing agreement with the Commission. Second, a bona fide claim may be an action alleging age discrimination filed in court by the individual or the individual's representative.

In addition to these traditional expressions of a bona fide claim, the legislation provides for a third, less formal alternatives. The bona fide claim requirement may be satisfied if the individual makes a specific allegation of age discrimination, in good faith and in writing, communicated directly to the employer (including where applicable a federal agency), employment agency or labor organization or their representatives. The committee expects that this type of bona fide claim will occur in situations where an older worker suspects age discrimination may be involved in an adverse employment decision, but the employee has not yet decided to take formal legal action. The ADEA encourages conciliation and informal resolution as a means of achieving voluntary compliance without litigation. The Committee has these objectives in mind when providing that claims of discrimination need not be formalized in order to be settled without federal supervision or involvement.

At the same time, the Committee is sensitive to the possibility that employers might "encourage" employees to "allege" age discrimination in order to reach a settlement that involves an unsupervised waiver of rights. In order to avoid any such collusive or coercive situations, the bill provides that the allegations must be specific, in writing, and made in good faith. By "specific", the Committee intends that the individual must allege age discrimination connected to a particular employment decision, *e.g.*, a termination, refusal-to-promote, a failure-to-hire. Statements that would suffice as charges or complaints of age discrimination if presented to the EEOC would constitute "specific allegations" within the meaning of section 7(f)(4)(C). The additional requirement that the claim be "in writing" minimizes the risk that a claim will be manufactured by the employer in order to produce a quick "settlement." Morever, if the "specific allegation" could be oral, the result would surely be additional litigation over issues such as the date on which a claim was made, the scope of the violation addressed by the claim, and even whether such a claim was made at all.

The requirement that the written allegation be communicated in good faith goes to the intent of the individual making the allegation, and *not* to the merits of the claim itself. This distinction also applies when interpreting the concept of a "bona fide" claim. The Committee intends that both of these terms ("bona fide" and "good faith") refer to claims that are genuinely motivated and not spurious. They do *not* involkve any determination as to the underlying legal merit of the claims.

If the individual involved is a federal employee, the written allegations may have to be communicated to the federal agency that employs the individual. The Committee wishes to clarify that it is not requiring the filing of a formal complaint in order for there to be a valid waiver of an ADEA claim. Rather, an individual need only make a written allegation of age discrimination during the EEO counseling process. *See* 29 C.F.R. 1613.213.

B. CRITERIA FOR A VALID UNSUPERVISED WAIVER

The presence of a bona fide claim is a pre-requisite to any unsupervised waiver of ADEA rights. Once a bona fide claim has been made, ADEA rights may be waived as part of an unsupervised settlement agreement, *provided* that certain criteria are met during the waiver process. These criteria are intended to accord basic due process protections to employees who are asked to execute waivers.

The unsupervised waiver must be knowing and voluntary. At a minimum, the waiving party must have genuinely intended to release his ADEA claims and must have understood that he was accomplishing this goal. He also must have acted in the absence of fraud, duress, coercion, or mistake of material fact. The Committee expects that courts reviewing the "knowing and voluntary" issue will scrutinize carefully the complete circumstances in which the waiver was executed. In this regard, the Committee expresses support for the approach taken on this limited issue in *Cirillo* v. *Arco Chemical Co.,* 862 F.2d 448 (3rd. Cir. 1988), and disapproves the approach adopted in *Lancaster* v. *Buerkle Buick Honda Co.,* 809 F.2d 539 (8th Cir. 1987), *cert. denied* 107 S.Ct. 3212 (1987).

Apart from specifying that any unsupervised waiver must be knowing and voluntary, the legislation provides further requirements. Some of these are indicia of whether a waiver is knowing and voluntary; all are necessary independent of the "knowing and voluntary" factor.

The waiver must be part of a written settlement agreement which specifically identifies that rights and claims under the ADEA are being waived. This degree of clarity and specificity increases the chances that individuals will know their rights upon execution of a waiver. The Committee expects that courts will pay close attention to the language used in the agreement, to ensure that this language is readily understandable to individual employees regardless of their education or business experience.

The settlement agreement may not waiver any rights or claims that may arise after the date the agreement is executed. It is a basic principle of fairness that employees shold not be permitted to waiver rights or claims on a prospective basis. To take one example, a settlement agreement may call for an employee to receive specified monthly benefit payments for the duration of his life. At some time in the future, those payments may be modified or eliminated in a manner inconsistent with the terms of the agreement. Any waiver of rights that precluded an employee from enforcing those terms would be invalid.

The ADEA rights and claims may be waived only in exchange for consideration that exceeds what the individual already was entitled to by contract or law. This concept of valuable consideration is sufficient to cover waivers incident to the settlement of an individual claim of age discrimination.

But when something of value has been offered to a group or class of individuals as part of an early retirement incentive or other employment termination program, a different approach to the concept of consideration is warranted. In this group termination context, the Committee intends that even though what is being offered is not yet an entitlement, the offer itself may not be the basis for an

unsupervised waiver. Without repeating the detalied discussion of this issue set forth in Section II above, the Committee intends to prohibit the use of such "preemptive waivers" as a condition of participating in exit incentive or other group termination programs. Older workers too often learn of these group termination programs in an atmosphere of surprise and uncertainty. In this setting, older employees are unlikely to be aware either of possible patterns of discrimination in the program itself, or of the nature of the remedies to which they might be entitled. Moreover, older employees may have no way of knowing about employer conduct subsequent to the completion of the program that would give rise to a claim of discrimination, *i.e.,* hiring younger workers to replace the terminated older employees. Allowing unsupervised waivers in such circumstances would be unfair and wholly inconsistent with the intent of the ADEA.

A group termination program may result in one or more participating individuals bringing an allegation of age discrimination. Should such a situation arise, the allegations may be settled for additional consideration with an unsupervised waiver as part of the agreement *if* the allegations qualify as a bona fide claim, *and* the other criteria for a valid unsupervised waiver are satisfied.

In the context of the ADEA, the Committee recognizes a fundamental distinction between individually tailored separation agreements and employer programs targeted at groups of employees. Individual separation agreements are the result of actual or expected adverse action against an individual employee. The employee understands that action is being taken against him, and he may engage in arms-length negotiation to resolve any differences with his employer.

Group termination and reduction programs stand in stark contrast to the individual separation. During this decade, in particular, employers faced with the need to reduce workforce size have resorted to standardized programs designed to effectuate quick and wholesale reductions. The trademark of involuntary termination programs is a standardized package of employee benefits that is available to more than one employee. The trademark of voluntary reduction programs is a standardized package of benefits designed to induce employees to voluntarily sever their employment. In both cases, the terms of the programs are not subject to negotiation between the parties. In addition, employees affected by these programs have little or no basis to suspect that action is being taken based on their individual performance or characteristics. Indeed, the employer generally advises them that the termination is *not* a function of their individual status. Under these circumstances, the need for supervision before waivers are signed is especially acute.

An unsupervised waiver is not valid unless the individual is given a reasonable period of time in which to review and consider the settlement agreement. An employee who is terminated needs time to recover from the shock of losing a job, especially when that job was held for a long period. The employee needs time to learn about the conditions of termination, including any benefits being offered by the employer. Time also is necessary to locate and consult with an attorney if the employee wants to determine what legal rights may exist.

The Committee chose not to refer to a specific number of days because no single number of days is "reasonable" in all instances. Where an individual termination is being disputed, the employee already has filed an EEOC charge, and the scope and amount of any possible remedy are clearly understood, then a time period of 14 days to consider a settlement offer may well be reasonable. But considerably more time will be necessary where the employee's claim arises from a retirement incentive offer and the settlement involves complex financial arrangements affecting that employee's income security for life. Under these circumstances, an employee may well require up to 60 days to review and understand the plan before agreeing to sign away potentially valid legal claims. This is particularly true for employees who have not previously received any retirement counseling, or for individuals who have never considered retirement.

Finally, any individual asked to execute a waiver without supervision must be advised in writing to consult with an attorney prior to entering into the settlement agreement. Given the complexity of issues involved and the inherently unequal bargaining position of the parties, the Committee expects the employer to encourage employees to consult with counsel to determine what legal rights they may have. An employee cannot be required to hire an attorney before signing a waiver, but it is vitally important that the employee understand the magnitude of what he is undertaking. Counsel is in the best position to provide that understanding.

All of the criteria discussed above must be met in order for an unsupervised waiver to be valid. A waiver of rights or a release of claims is generally available as an affirmative defense. The party relying on the defense has the burden of showing its scope and its applicability to the matter at hand. *See e.g., Brubaker* v. *United States,* 342 F.2d 655, 662 (7th Cir. 1965). the Committee intends that in any dispute over whether the requirements and conditions set forth in paragraph 7(f)(2) have been met, the party asserting the validity of the waiver shall have the burden of proving that the waiver process satisfied each of the factors in that paragraph. At the same time, the Committee does not intend that employers be forced to "prove a negative" where no evidence of fraud, duress or coercion exists. Thus, ordinarily an employer asserting a waiver defense will be obligated to prove that the conditions set forth in section 7(f)(2)(A) through (E) have been met. Once that occurs, the employee may produce additional evidence to suggest that the waiver was not "knowing and voluntary." The employer's burden at that point is simply to demonstrate that, with respect to the issues raised by the employee, the waiver *was* both knowing and voluntary.

C. RIGHT TO PARTICIPATE IN EEOC PROCEEDINGS

The legislation provides that an individual waiver may not interfere with the EEOC's rights and responsibilities to enforce the ADEA, nor may such a waiver be used to interfere with the employee's protected right to file a charge or to participate in an EEOC investigation or proceeding. The Committee intends this provision as a clear statement of support for the principle that the

elimination of age discrimination in the workplace is a matter of public as well as private interest. No waiver agreement may be permitted to interfere with the achievement of that goal. This position is consistent with the holding and reasoning of *EEOC* v. *Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987). An employee may validly waive the right to recover in his own lawsuit as well as the right to recover in a suit brought by the Commission on his own behalf.

D. EFFECTIVE DATA

The bill provides that the ADEA amendments described above are effective immediately upon date of enactment. The Committee intends that these amendments shall apply retroactively to any claims pending on the date of enactment, as well as applying prospectively to all waivers that are executed after the enactment date.

This approach is in accord with the general presumption that, absent a Congressional directive or manifest injustice, a change in the law is applicable to pending cases. *Bradley* v. *Richmond School Board,* 416 U.S. 696, 711, 715–716 (1974).

Enactment of a retroactive statute "confined to short and limited periods required by the practicalities of producing national legislation * * * is a customary Congressional practice" and is especially appropriate where Congress wishes to prevent employers from taking advantage of a lengthy legislative process to frustrate the purposes of a statutory change. *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.,* 467 U.S. 717, 731 (1984).

In this instance, applying the amendments to pending claims would further the interests of justice. The bill's clear purpose is to restore Congress's original intent that ADEA waivers be supervised, subject to a limited exception. All parties have been on fair notice of Congress's intent since Congress first acted to suspend the EEOC rule in October 1987. To limit application of this law to future waivers only would harm the interests of older workers. It also would give effect to an EEOC rule that has never been in operation and that already has been twice rejected by Congress.

The bill permanently nullifies this EEOC rule after having suspended the rule for two years. The Committee wishes to emphasize that section 9 of the ADEA may not be used to make legislative policy of this kind, and should not be so used again in the future. While section 9 grants authority to the EEOC to issue rules and regulations, the validity of any rules promulgated thereunder will be based on their consistency with both the language and purposes of the ADEA. Measured by these standards, the EEOC's waiver rule was invalid, a conclusion that prompted Congress to act by first temporarily, and now permanently, invalidating the rule.

VI. VOTES IN COMMITTEE

Votes taken during Committee consideration of the legislation were as follows:

1. The Committee rejected an amendment offered by Senator Hatch and Senator Jeffords in the form of a complete substitute, as amended by Senator Cochran, by roll call vote, 7–9.

YEAS	NAYS
Mr. Hatch	Mr. Kennedy
Mrs. Kassebaum	Mr. Pell
Mr. Jeffords	Mr. Metzenbaum
Mr. Coats	Mr. Matsunaga
Mr. Thurmond	Mr. Dodd
Mr. Durenberger	Mr. Simon
Mr. Cochran	Mr. Harkin
	Mr. Adams
	Ms. Mikulski

2. The Committee unanimously approved by voice vote an amendment offered by Senator Kennedy to provide that the legislation shall not affect an employee's right to file an EEOC charge or participate in EEOC preceedings.

3. The Committee voted to adopt and report S. 54 as amended, as an amendment in the nature of a complete substitute, by roll call vote, 11-5.

YEAS	NAYS
Mr. Kennedy	Mr. Hatch
Mr. Pell	Mr. Jeffords
Mr. Metzenbaum	Mr. Coats
Mr. Matsunaga	Mr. Thurmond
Mr. Dodd	Mr. Durenberger
Mr. Simon	
Mr. Harkin	
Mr. Adams	
Ms. Mikulski	
Mrs. Kassebaum	
Mr. Cochran	

VII. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, June 15, 1989.

Hon. Edward M. Kennedy,
Chairman, Committee on Labor and Human Resources, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 54, the Age Discrimination in Employment Waiver Protection Act of 1989, as ordered reported by the Committee on Labor and Human Resources on June 14, 1989. We estimate that enactment of S. 54 would have no effect on the federal budget, or on the budgets of state and local governments.

S. 54 would amend the Age Discrimination in Employment Act of 1967 to prevent employees form waiving rights under the Act upon retirement. Currently, some employers are requiring retiring employees, particularly employees accepting early retirement offers, to sign waivers of the right to bring cases of age discrimination against the employer. The bill would prohibit signing a waiver unless under the supervision of a court or the Equal Employment Opportunity Commission, or the waiver is part of a settlement of

an age discrimination suit. The bill would be effective upon the date of enactment.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

ROBERT D. REISCHAUER,
Director.

VIII. REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the following statement of the regulatory impact of S. 54 is made:

A. ESTIMATED NUMBER OF INDIVIDUALS AND BUSINESSES REGULATED AND THEIR GROUPS OR CLASSIFICATIONS

S. 54 would amend the Age Discrimination in Employment Act of 1967 (ADEA), as amended, and as such, would apply to all employees and employers currently covered by that law. Employers with fewer than twenty employees are exempt from the requirements of ADEA, and, therefore, would be exempt from the requirements of S. 54. Employees who are at least 40 years of age are protected by the provisions of the ADEA. The U.S. Bureau of Labor Statistics (BLS) estimates that in 1988, approximately 46 million workers forty years of age and older were employed in the civilian workforce and the Armed Forces.

The universe of individuals and businesses that would actually be affected by the legislation is much smaller. S. 54 would affect only those employees of businesses that require employees to sign a waiver releasing their rights or claims under the ADEA. One component of this group is employees who are asked to sign a waiver as a condition of participating in an early retirement incentive or other exit incentive program. At hearings before the Labor Subcommittee, the U.S. General Accounting Office (GAO) estimated that up to one million workers may have participated in exit incentive programs over the past ten years. The Committee was not able to determine the precise number of individuals who were required to sign waivers as a condition of participation in exit incentive programs. However, the number certainly is only a small percentage of those participating in such exit incentive programs, and an even smaller percentage of the total workforce. As one indication, the General Accounting Office, in an April 1989 report on practices of companies offering exit incentive programs, found that only 28% of the companies surveyed required employees to sign waivers as a condition of participation in such exit incentive programs.

In sum, the proposed legislation will regulate only those individuals and businesses that currently are regulated by the Age Discrimination in Employment Act. The actual number of parties who will be affected by the legislation will be substantially less.

B. ECONOMIC IMPACT ON THE INDIVIDUALS, CONSUMERS, AND BUSINESSES AFFECTED

The Committee is unable to determine what, if any, economic impact the legislation would have on affected individuals, consum-

ers, and businesses, but the Committee believes that any such impact will be minimal.

C. IMPACT OF THE ACT ON PERSONAL PRIVACY

The legislation does not have any personal privacy implications, other than to disallow the use of private waiver "agreements" that some employees have been required to sign as a condition of receiving certain employment benefits. This does not mean that the legislation intrudes into personal privacy; rather, the legislation offers legal protections to those employees who otherwise might have been quietly and unknowingly manipulated or coerced into waiving their statutory rights.

D. ADDITIONAL PAPERWORK, TIME, AND COSTS

S. 54 may result in some additional paperwork, time, and costs due to the agency supervision requirements in the legislation. Under S. 54, an individual may only waive rights under the Age Discrimination in Employment Act with the supervision of the Equal Employment Opportunity Commission (EEOC) or a court, unless the waiver is in settlement of an actual claim of age discrimination. The Chairman of the EEOC testified before the Labor Subcommittee that this supervision requirement would result in additional costs to the agency. The Chairman did not specify the magnitude of any such additional costs.

The Committee does not expect that the EEOC will incur a substantial increase in costs as a result of enactment of the legislation. It is important to note that the Congressional Budget Office estimates that the legislation "would have no effect on the federal budget, or on the budgets of state and local governments." [See section VII, Cost Estimates]. Finally, a primary goal of the legislation is to discourage companies from using waivers in connection with exit incentive programs. To the extent that the legislation has its intended effect of discouraging the use of waivers, any corresponding costs would be reduced.

IX. Section-by-Section Analysis

TITLE

Section 1 establishes the short title of the Act as the Age Discrimination in Employment Waiver Protection Act of 1989.

WAIVER PROVISION

Section 2 amends section 7 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626) by adding a new subsection 7(f). The new subsection provides as follows:

Limitation on waiver

7(f)(1) states that with one exception, an individual may not waive any right under this Act without the supervision of the Equal Employment Opportunity Commission or a court. The exception arises where the individual is waiving rights as part of the settlement of a bona fide claim alleging age discrimination which is

prohibited under section 4 or section 15 of the ADEA. (The term "bona fide claim" is later defined.)

Criteria for a valid unsupervised waiver

7(f)(2) states that a bona fide claim may be settled only if the waiver is knowing and voluntary and also meets the following criteria:

7(f)(2)(A) provides that the settlement agreement must be in writing and must specifically refer to rights or claims that may arise under the ADEA;

7(f)(2)(B) provides that the agreement must not waive future rights or claims that may arise after the effective date of the agreement;

7(f)(2)(C) provides that the rights or claims must be waived in exchange for consideration in addition to anything of value (i) to which the individual already is entitled or (ii) that has been offered to a group or class of individuals under an early retirement incentive or other employment termination program;

7(f)(2)(D) provides that the individual must be given a reasonable amount of time to consider the agreement;

7(f)(2)(E) provides that the individual must be given written advice to consult an attorney before entering into the agreement.

Right to participate in EEOC proceedings

7(f)(3) states that no waiver agreement may affect the Commission's rights and responsibilities to enforce this Act. Additionally, no waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

Definition of bona fide claim

7(f)(4) defines the term "bona fide claim," which is used in section 7(f)(1), as one of three possible alternatives:

The first alternative, 7(f)(4)(A), is a charge of age discrimination filed with the Equal Employment Opportunity Commission;

The second alternative, 7(f)(4)(B), is an action alleging age discrimination filed in court by the individual or the individual's representative;

The third alternative, 7(f)(4)(C), is a written communication alleging age discrimination submitted directly to the individual's employer, employment agency, or labor organization or their representatives by the individual or the individual's representative.

EFFECTIVE DATE

Section 3(a) states that the amendments made by this Act shall be effective on the date that it is enacted.

Section 3(b) states that the previous rule on waivers issued by the Equal Employment Opportunity Commission (in section 1627.16(c) of title 29 of the Code of Federal Regulations) shall have no force or effect after enactment of this Act.

X. Additional and Minority Views

ADDITIONAL VIEWS OF SENATORS COCHRAN AND KASSEBAUM

Although we voted to report S. 54 from Committee, we continue to have concerns about the legislation and hope that these concerns will be addressed and resolved.

As provided in S. 54, except in settlement of as bona fide claim of age discrimination, the EEOC or a court must supervise all individual waivers of employee rights under the Age Discrimination in Employment Act. While some degree of supervision or oversight is desirable, and may even be necessary in some instances, it ought not to impose a burden on employers that will discourage them from offering retirement incentive programs. We don't believe that result will serve the interests of older workers who may wish to have an opportunity to participate in early retirement incentive programs and receive the additional benefits offered.

We are encouraged by the discussion of a possible compromise that would allow employers to submit their proposed retirement incentive programs to the EEOC or an outside panel of EEOC approved attorneys for review of their ADEA implications. Under such a procedure, employees would have a source of competent and informed legal advice before signing a waiver. We see nothing wrong with the EEOC or any other independent group of experts performing this type of supervisory function, if it helps to ensure that employees are better informed of their ADEA rights and serves to discourage coercion that might otherwise occur.

While supervision by the EEOC, the courts, or some other competent entity, is one way to provide protection for ADEA rights of older workers, we are not convinced that it is the only way. An employee ought to have the right to sign a waiver without formal supervision, if he is properly advised of ADEA rights, if he understands what is being waived, if there is no coercion, and if it is truly voluntary. We should not require the EEOC or the courts to come in and look over the shoulder of every employee who is asked by his employer to sign a waiver as a condition to qualify for the additional benefits that would be available under an early retirement incentive program.

We supported the Hatch-Jeffords amendment at markup, and we remain sympathetic to their approach which, as an alternative to strict supervision, would allow an employee to waive ADEA rights only when specific conditions are met. Those conditions would help to ensure that employees are aware of their rights and are given sufficient time to consider a waiver of those rights and are advised to seek legal advice. Perhaps there are additional conditions or re-

quirements that could be included to guarantee that an employee will receive legal advice on ADEA rights and enough information on the early retirement plan being offered to make an informed and voluntary decision.

While this legislation is awaiting consideration by the Senate, we hope that efforts to compromise will continue. Older workers deserve a bill which will allow them to waive their ADEA rights voluntarily. Such a bill does not have to require strict and burdensome government supervision that will discourage employers from offering to those workers the benefits of early retirement incentive programs.

THAD COCHRAN,
U.S. Senator.
NANCY LANDON KASSEBAUM,
U.S. Senator.

MINORITY VIEWS OF SENATORS HATCH, JEFFORDS, THURMOND, DURENBERGER, AND COATS

S. 54 would, as a practical matter, preclude employees from releasing their rights or claims regarding a particular employment action under the Age Discrimination in Employment Act (ADEA) unless they have filed or submitted a written allegation, charge, or lawsuit. The question we ought to ask ourselves about this radical departure from current law, under which waivers that are not "knowing and voluntary" are invalid, is whether it serves the interests of employees and the public to "protect" employees in a manner that jeopardizes the type or level of benefits offered to them and promotes litigation rather than informal resolution of disputes and potential disputes.

The answer, we believe, is that it does not. This is a poorly conceived bill that would preclude an employee from making a voluntary and informed decision to sign a release in exchange for additional benefits. What it says is that Congress is in a better position than the employee to decide whether he or she should voluntarily sign a release because we can't trust employees to make such decisions for themselves. As a result, options which may be extremely beneficial to employees may be eliminated.

This bill may not harm an employee with the resources, time and inclination to pursue a claim through a formal administrative or judicial process. It will harm, however, the employee who is unwilling or unable to pursue litigation for any number of reasons including that it may not be successful. If this bill becomes law, that employee will likely lose the option to waive his or her rights in exchange for at least as generous a benefit package as would otherwise be available.

Why is such legislation necessary? Is it because, as some proponents argue, that employers use waivers as protection for actions that could not otherwise withstand judicial scrutiny? We think not. We think that in a litigous society such as ours, it is not unreasonable for employers, who are inclined to ease the lawful separation of employees, to seek some assurance that an employee will not accept a generous benefit and then sue the employer the next day. Moreover, is it not in both the public's and the employee's interest to allow parties to voluntarily resolve their disputes short of litigation? Precluding settlements simply because they might insulate a potential wrongdoer from a possible adverse judicial finding would appear largely inconsistent with the generally accepted notion that the voluntary resolution of disputes between parties in the employment context is preferable to litigation.

We believe that it is important to preserve rather than limit the options and choices available to employees. We recognize, however, that Congress might perform a valuable service to employees by enacting legislation which preserves employee options and choices

but at the same time ensures that those choices are truly voluntary and informed. The alternative, offered as a substitute by Senators Hatch and Jeffords, and described in detail below, strives to do precisely that without limiting the free choice of employees, jeopardizing their potential benefits, or unnecessarily forcing them into litigation.

I. Background

A. WHAT ARE WAIVERS AND WHEN ARE THEY USED?

Releases or waivers under the ADEA may be used in a number of different contexts. For example, if an employee is discharged for cause, he or she may nonetheless be offered either a sum of money or something else of value in resolution of any and all claims resulting from the discharge. This would in all likelihood include any claim under the ADEA if the employee is over 40 years of age. In this circumstance, the employee is, of course, free to decline the offer and litigate the discharge.

A second situation is one in which companies, faced with the need to downsize their operations, are forced to implement an involuntary reduction-in-force. In order, however, to alleviate some of the resultant hardship on affected employees and/or to avoid the substantial cost and burden of potential litigation, the company may offer employees something of value, in addition to what they are otherwise entitled, in exchange for their signing a release of claims resulting from their termination. Again, employees are free to consider this offer and to reject or accept it.

Finally, certain companies forced to downsize may at least initially try to accomplish the requisite workforce reduction by offering employees an early-out incentive program. Employees are typically offered a substantial cash bonus to retire early in exchange for signing a waiver or release agreeing not to sue the company later for age discrimination. The employees, of course, are free to accept the offer or reject it.

For any number of reasons, not all companies require releases, at least in the context of early out incentive programs. But does that mean, as some have suggested, that employers who seek releases do so because they know they are violating the law? Certainly not. It is not unrealistic, in our view, for a company to at least try to avoid litigation. Even meritless claims, as we all know, can represent a substantial financial burden. Some companies prefer, rather, to apply money otherwise set aside for litigation to the initial level of benefits offered employees. Further, it bears noting that most of the litigation regarding early-out incentive programs is by employees who were not given the opportunity to participate in these programs, rather than by effected employees.

B. CURRENT LAW

The prohibitions regarding the use of waivers in S. 54 represent a radical departure from current law and not a clarification, as supporters of this bill have suggested. Further, the rationale for this legislation appear to ignore safeguards under current law applicable to the execution of waivers.

So long as waivers meet certain criteria, courts have uniformly upheld their use for any number of causes of action under federal and state law including Title VII. Why, one might then legitimately ask, should waivers under the ADEA justify being treated differently?

Supporters of S. 54 have an answer to that question. One answer which they continue to give—notwithstanding that it has been uniformly rejected by the six United States Courts of Appeals which have considered it—is that the ADEA's enactment as part of the Fair Labor Standards Act (FLSA) dictates that FLSA requirements regarding private wage settlements, including their supervision, also apply to ADEA settlements. These courts, and federal district courts as well, have held that employees may release claims under the ADEA without prior or concurrent government supervision.

First, the FLSA authorizes federal supervision but does not require it. Second, two Supreme Court cases decided long before the ADEA was enacted prohibited private settlements of wage and hour claims under the FLSA but did so on facts different from those likely to arise in cases under the ADEA. *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697 (1945) and *Schulte, Inc.* v. *Gangi,* 328 U.S. 108 (1946). Courts have recognized that there are major differences between the straightforward issues under the FLSA regarding such matters as whether a rate of pay is below the statutory minimum, and the far more complex factual issues which typically underlie ADEA cases. See e.g. *Runyan* v. *National Cash Register Corp.,* 787 F. 2d 1039 (6th Cir.) (en banc), *cert. denied,* 479 U.S. 850 (1986).

Finally, the legislative history of the ADEA reflects bipartisan Congressional support for the informal resolution of ADEA claims and is silent on any prohibitions on private settlements. Sponsors repeatedly emphasized the desirability of informal conciliation and settlements. Senator Williams stated that the ADEA should allow the employee "to resolve the dispute *himself* or work out a compromise with an employer." 123 Cong. Rec. S. 17275 (daily ed. Oct. 19, 1977) (emphasis added). Moreover, Senator Javits stated that an important objective of the ADEA was to avoid the "delays which plague so many of our agencies, such as the EEOC and the NLRB. The EEOC, for example, is already years behind in disposing of its docket. Such delay is always unfortunate, but it is particularly so in the case of older citizens to whom, by definition, relatively few productive years are left." Age Discrimination in Employment: Hearings on S. 830 and S. 786, Before the Subcommittee on Labor of the Senate Committee on Public Welfare, 90th Cong., 1st Sess. 24–25 (1967).

Proponents of this legislation also appear to ignore the protections available under current law. Courts have repeatedly required that waivers only be upheld if they are "knowing and voluntary." They have carefully scrutinized the release itself and the circumstances surrounding its execution to ensure that employee rights are adequately safeguarded. See e.g. *Cirilo* v. *Arco Chemical Co.,* 862 F. 2d 448 (3d Cir. 1988). For example, it is clear that if an employee is coerced into signing the waiver, the waiver will not meet the requisite criterion that it be voluntary.

II. S. 54—Description and Impact

Under S. 54, no waiver or release would be valid unless (1) it is supervised by the EEOC or the courts, or (2) the employee signing the waiver has accused his or her employer of age discrimination by filing a written allegation, charge or lawsuit. These restrictions would apply to ADEA waivers in all circumstances, including individual discharges for cause, involuntary group terminations (layoffs), and voluntary early-out exit programs.

Virtually everyone acknowledges that court supervision is not a feasible option for several reasons including that it raises Constitutional questions. Supervision by the EEOC is equally problematic and unworkable. First, the bill itself is completely silent regarding what such supervision would entail. Second, Chairman of the EEOC, Clarence Thomas, testified before the Labor Subcommittee in March that the bill would result in an increase in work for the government and curtailment of employees' existing choice to waive rights without filing an age discrimination complaint, and would require additional resources. He also suggested that EEOC review of a prototype or other generic waiver agreement would constitute sufficient supervision. It is clear from the Committee report, however, that a much more costly, elaborate, and time-consuming process may be contemplated, thereby likely to strain Commission resources needed to fulfill its mission.

Finally, the time lag in obtaining such supervision may well be so costly to the employer that it will result in either the layoff of additional employees or a decrease in the level of benefits otherwise offered.

Given the difficulties with and questions concerning supervision, it is not hard to understand why some have concluded that this option is meaningless and that this bill, as a practical matter, precludes waivers in the absence of a formal claim or charge.

It is vital that Congress carefully examine the impact of the restrictions and limitations of this bill with respect to the use of waivers in both the absence of and the context of a formal claim or complaint. There is much at stake here in terms of the type of termination and retirement programs offered to employees and the level of benefits available as part of those programs.

We take little comfort in the theoretical representations by supporters of this bill that it ought not to dissuade employers from continuing to offer what are frequently generous and advantageous termination programs. Statements from major corporations concerning this legislation strongly suggest that it will, in fact, jeopardize the programs and benefits offered based on sound and legitimate business judgements. For example, Caterpillar Inc., in a May 19 letter to this Committee stated that "the extent to which companies can continue to rely on ADEA waivers will inevitably affect future incentive offerings." The Kraft Corporation, in its March 15 letter to the Labor Subcommittee stated that "companies will surely reduce the severance benefits that they provide to terminated employees" as a result of this proposed legislation. General Mills, Inc. stated in its March 14 letter that as a result of this legislation, "more conservative approaches to separation payments come to appear to be the only prudent alternative." Finally, IBM,

which recently used releases as a condition of participation in an incentive program, stated the following in its March 21 letter to the Labor Subcommittee:

> IBM considers the right to require an enforceable release of all employment-based claims in exchange for the significant consideration given as part of such programs an important one. There is no reason an employer should be expected to make these significant payouts and then have to bear the high costs of litigating ADEA claims with the recipients.

This bill is touted by its supporters as a vehicle to protect employees. By making the informal and expeditious resolution of claims and potential claims more unlikely, difficult and complicated, however, who will most likely be harmed? We believe that legislation such as this, which jeopardizes employee benefits, precludes the knowing and voluntary choices of employees, and limits the options available to them does not serve the interests of employees. Employees do not need this type of protection.

Finally, we have a further concern about the effective date of this bill. The bill language itself may be interpreted as either applying only to waivers executed after the effective date of this legislation, or, to at least certain waivers executed prior to enactment. The Committee Report, apparently applies the latter interpretation. Under the Report's interpretation, the bill would apply retroactively to any claims pending on the date of enactment. Thus, certain waivers executed at a time when the bill's requirements were neither known nor capable of being complied with may, under the Report's interpretation, nonetheless be invalid.

As previously noted, the six circuit courts which had previously considered whether unsupervised waivers under the ADEA are valid had unanimously concluded that they are, as long as the waivers are "knowing and voluntary." Thus, bill sponsors would apply the supervision requirement retroactively notwithstanding that it represents a marked change in the state of law applicable at the time such waivers were executed.

What makes retroactive application even less acceptable is that retroactive application of this legislation would be far more onerous than its prospective application. What we mean by this is that even if employers had been clairvoyant enough to realize that Congress would overrule the decisions of six circuit courts, it is extremely questionable whether they could have obtained court or EEOC supervision provided for in this bill prior to enactment.

There have been suggestions that supervision has been used and available in the past. In testimony before the Labor Subcommittee on May 24, 1988, however, the EEOC's Legal Counsel stated as follows:

> There seems to be a widespread misconception that EEOC was routinely supervising waivers and that our (1987) regulation permitting us to cease providing such supervision. This is not the case. EEOC never has had a general process or procedure for supervising and approving

each and every private waiver of ADEA rights when no charge of discrimination has been filed.

Congressional action in 1987 to suspend the EEOC's rule does not serve as fair notice of Congressional intent, as suggested by the Committee Report. As the U.S. Court of Appeals for the Second Circuit recently observed in rejecting such an argument, the passage of recent appropriations legislation suspending the EEOC rule is not an authoritative interpretation of what the ADEA meant when it was enacted in 1967. *Bormann* v. *AT&T Communications,* 875 F.2d 399 (2d Cir. 1989).

In sum, there is simply no rational basis for applying the provisions or requirements of this bill to waivers executed prior to its effective date. Even setting aside the serious legal questions raised by retroactive application under these circumstances, as a matter of common sense and fundamental fairness, retroactive application should not be permitted.

III. A Reasonable Alternative Approach

Everyone agrees that employees should be protected from unfair or coercive practices in connection with the execution of waivers. Any waiver must be knowing and voluntary in order to reflect the intent of the parties to make the agreement. Unlike S. 54, the alternative offered by Senators Hatch and Jeffords is a straightforward attempt to address the stated problems encountered by employees in connection with ADEA waivers. Thus, the proponents of the bill have argued that employees faced with the decision of whether to sign a waiver do not have sufficient information to make informed choices. We propose that sufficient disclosures be mandated to provide a basis for employees to make knowing and voluntary decisions. This alternate proposal includes the following safeguards:

Waivers must be in writing;

Waivers must specify ADEA rights and state that the employee understands those rights;

Waivers must provide written advice to consult an attorney;

Waivers must provide at least a 21 day period to consider;

Waivers must not cover rights arising after its execution;

Waivers must be exchanged for consideration additional to current entitlement;

Waivers must provide at least a 7 day revocation period; and

With regard to early retirement incentive or other termination programs, the employers must provide the employees with information regarding the scope and nature of the program, the eligibility factors for the program and any applicable time limits.

It is interesting to note that had this proposal been law at the relevant time, its application would have taken care of the complaints of many of the hearing witnesses who testified in support of this bill without requiring the more intrusive and obstructive measures contemplated by S. 54.

Finally, this proposal would not serve to reopen settlements previously entered. Rather, it would have a purely prospective application to waivers executed more than 60 days after enactment. This

is obviously the fairer approach in that it will not upset the settled expectations of the parties entered into in good faith and in accordance with the state of the law at the time of execution.

IV. Conclusion

For the reasons stated above, we oppose this legislation. It unnecessarily interferes with the free choice of employees, jeopardizes the benefits and programs otherwise offered to them, and promotes unwarranted litigation. In contrast, the alternative offered by Senators Hatch and Jeffords allows Congress to play a constructive role in ensuring that waivers are knowing and voluntary, but yet preserving their use.

The sponsors of this legislation are correct about at least one thing: the individuals most likely to be affected by this bill typically and unfortunately have limited options available to them. Where the sponsors err, however, is in their belief that Congress will be acting in the best interest of these individuals by further limiting those options.

Orrin Hatch.
James M. Jeffords.
Strom Thurmond.
David Durenberger.
Dan Coats.

XI. Changes in Existing Law

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides a print of the statute or the part or section thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

Age Discrimination in Employment Act

(29 U.S.C. 626)

* * * * * * *

SECTION 626. RECORDKEEPING, INVESTIGATION, AND ENFORCEMENT.

(a)–(e) * * *

(f)(1) An individual may not waive any right under this Act without the supervision of the Equal Employment Opportunity Commission or a court, except in settlement of a bona fide claim alleging age discrimination of a kind prohibited under section 4 or section 15 of this Act.

(2) A settlement of a bona fide claim pursuant to paragraph (1) may occur only if the waiver is knowing and voluntary and only if—

(A) a settlement agreement applicable to the bona fide claim is in writing and specifically refers to rights or claims arising under this Act;

(B) the agreement does not waive rights or claims that may arise after the date the agreement is entered into;

(C) the rights of claims are waived in exchange for consideration in addition to anything of value—

(i) to which the individual already is entitled; or

(ii) that has been offered to a group or class of individuals under an early retirement incentive or other employment termination program;

(D) the individual is given a reasonable period of time in which to consider the agreement; and

(E) the individual is advised in writing to consult with an attorney prior to entering into the agreement.

(3) No waiver agreement may affect the rights and responsibilities of the Equal Employment Opportunity Commission to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

(4) For the purpose of this subsection, the term "bona fide claim" means—

(A) a charge of age discrimination filed with the Equal Employment Opportunity Commission;

(B) an action alleging age discrimination filed in court by the individual or the individual's representative; or

(C) a specific allegation of age discrimination communicated in good faith and in writing by the individual or the individual's representative directly to the employer (including, where applicable, a Federal agency), employment agency, or labor organization or their representatives.

○